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No. 05-465

Supreme Court, U.S.
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In The
Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF A CLASS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a corporate defendant and those it enlists to assist it in conducting the corporation's affairs may together constitute an association-in-fact "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961(4), and one that is distinct from the corporate defendant itself, as required under 18 U.S.C. § 1962(c).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

A Corporate Defendant Cannot Be Liable For Conducting The Affairs Of A RICO Association-In-Fact Enterprise When The Allegedly Distinct Enterprise Consists Of The Corporation And Those It Enlists To Assist It In Conducting The Corporation's Affairs 5

A. The Association-in-Fact Prong Of The "Enterprise" Definition In RICO Section 1961(4) Applies Only To Groups Of "Individuals," Which Requires Reversal Of The Judgment Below 5

1. An association-in-fact enterprise is limited to a group of "individuals," and a corporation is not an individual within the meaning of the statute 6

2. This Court should use the occasion of this case to halt the lower courts' misguided expansion of the RICO "enterprise" definition 9

3. This Court should resolve this case based on the plain meaning interpretation of association-in-fact enterprise to prevent circumvention of this Court's decision in *Reves* 14

TABLE OF CONTENTS – Continued

Page

B. A Corporation Conducting Its Own Affairs With The Assistance Of Other Entities Or Individuals Is Not, By Virtue Of That Assistance Alone, Conducting The Affairs Of An Enterprise In Violation Of RICO Section 1962(c) 15

1. To violate Section 1962(c), a RICO defendant must conduct, through a pattern of racketeering, the affairs of an enterprise distinct from the affairs of the defendant itself 15

2. The contrary ruling of the court of appeals improperly threatens a corporation with treble damages based on use of contractors to conduct the corporation's business affairs, which is a common business practice that is critical to the efficiency of the Nation's economy 19

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES:

Atkinson v. Anadarko Bank & Trust Co., 808 F.2d 438 (5th Cir. 1987) 17

Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986 (8th Cir. 1989) 9

Bernard v. Hoff, 727 F. Supp. 211 (D. Md. 1989) 9

Blankenship v. Western Union Tel. Co., 161 F.2d 168 (4th Cir. 1947) 10

Brannon v. Boatmen's First Nat'l Bank of Oklahoma, 153 F.3d 1144 (10th Cir. 1998) 18, 22

Brittingham v. Mobil Corp., 943 F.2d 297 (3d Cir. 1991) 17

Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001) 15, 16, 17, 23

Clinton v. New York, 524 U.S. 417 (1998) 6, 7

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Discon, Inc. v. NYNEX Corp., 93 F.3d 1055 (2d Cir. 1996), *rev'd*, 525 U.S. 128 (1998) 17

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FCC v. American Broad. Co., 347 U.S. 284 (1954) 12

Fitzgerald v. Chrysler Corp., 116 F.3d 225 (7th Cir. 1997) 13, 17, 23

H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989) 11

Miranda v. Ponce Fed. Bank, 948 F.2d 41 (1st Cir. 1991) 22

TABLE OF AUTHORITIES – Continued

Page

Montello Salt Co. v. Utah, 221 U.S. 452 (1911) 9, 10

Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164 (C.D. Cal. 2005) 7

In re Oliver North (Gadd Fee Application), 12 F.3d 252 (D.C. Cir. 1994) 7

Reves v. Ernst & Young, 507 U.S. 170 (1993) ..... *passim*

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Sedima v. Imrex Co., Inc., 473 U.S. 479 (1985) 10, 22

TRW, Inc. v. Andrews, 534 U.S. 19 (2001) 7

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TABLE OF AUTHORITIES – Continued

Page

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Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 922 (1970) ..... *passim*

§ 904(a), 84 Stat. 947 12

18 U.S.C. § 1961(3) 8, 11

18 U.S.C. § 1961(4) ..... *passim*

18 U.S.C. § 1961(10) 10

18 U.S.C. § 1962(a) 12

18 U.S.C. § 1962(b) 12

18 U.S.C. § 1962(c) ..... *passim*

18 U.S.C. § 1962(d) 12

18 U.S.C. § 1964(a) 10

18 U.S.C. § 1964(c) 22

U.S. Sentencing Guidelines (2005):

§ 5E1.3 8

§ 8A1.2 8

§ 8E1.1 8

MISCELLANEOUS:

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TABLE OF AUTHORITIES – Continued

Page

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Page

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America, the National Federation of Independent Business Legal Foundation, and the Society for Human Resource Management respectfully submit this brief as *amici curiae* in support of petitioner.[1]

INTERESTS OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the nation's largest federation of businesses, representing an underlying membership of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. One important function of the Chamber is to represent the interests of its members by filing briefs as *amicus curiae* in cases involving issues of national concern to American business, including cases construing the Racketeer Influenced and Corrupt Organizations Act (RICO).

The National Federation of Independent Business Legal Foundation – a nonprofit public interest law firm established to protect the rights of America's small business owners – is the legal arm of the National Federation of Independent Business (NFIB), the nation's oldest and largest organization dedicated to representing

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[1] Letters from petitioner and respondents providing consent to the filing of *amici* briefs in this case have been filed with the Clerk of this Court. Pursuant to Rule 37.6, *amici curiae* hereby state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

the interests of small business owners throughout all 50 states. The 600,000 NFIB members own a wide variety of small businesses, including restaurants, family farms, neighborhood retailers, service companies, and technology manufacturers.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 200,000 individual members, SHRM's mission is to serve the needs of human resource professionals by providing the most essential and comprehensive resources available. As an influential voice, SHRM's mission is also to advance the human resource profession to ensure that human resource management is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in more than 100 countries.

Amici recognize the importance of consistent and disciplined application of RICO to deter and remedy wrongdoing prohibited by the statute. At the same time, they are concerned about those who have strong incentives to misuse the statute against legitimate businesses, in large part because of civil RICO's treble damages provisions.

The court of appeals' holding in this case that plaintiffs adequately pleaded a RICO "enterprise" consisting of the defendant corporation and its alleged agents threatens to expand dramatically RICO liability for corporations that, to remain competitive, must rely more than ever on non-employees to provide certain goods and services. It threatens to convert a statute that was designed to deter organized crime into a tool primarily used to induce settlements from legitimate businesses that cannot risk either the possibility of being subjected to an award of treble damages or the reputational injury of being sued in federal court under a statute associated with racketeers and mobsters. Accordingly, *amici* and their members have a strong interest in the Court correctly

interpreting RICO and reversing the decision below with regard to the federal RICO claims.

SUMMARY OF ARGUMENT

As the name of the act suggests, a person violates the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, when the person criminally influences or corrupts an organization. This case involves the scope of one of the four categories of such activity prohibited by Congress through RICO. Section 1962(c) prohibits a "person" (which includes a corporation) that is "employed by or associated with" a statutorily-defined "enterprise" from conducting, or participating in the conduct of, the affairs of that enterprise through a pattern of racketeering. 18 U.S.C. § 1962(c). For purposes of RICO, "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

The enterprise alleged in this case consists of the defendant corporation and certain recruiters and employment agencies who assisted in carrying out the affairs of the corporation. The court of appeals erroneously held that such allegations of an "enterprise" survive a motion to dismiss because, in the court of appeals' view, any "'loose or informal' association of distinct entities" may form an association-in-fact RICO enterprise, and the court found that it could not say at that stage of the litigation whether the plaintiffs could establish that the defendant corporation conducted or participated in the conduct of the affairs of the alleged enterprise. Pet. App. 7a-9a. That "anything goes" approach to RICO enterprises and Section 1962(c) liability is contrary to the plain statutory text and the purpose of the RICO statute.

First, the association-in-fact enterprise alleged in this case does not satisfy the statutory definition of "enterprise." The combination of a corporation and others carrying out the affairs of the corporation does not, and was not alleged to, constitute a "legal entity" and therefore

cannot meet the first prong of the "enterprise" definition. Nor does it constitute a "group of individuals associated in fact" because a corporation is not an "individual" within the meaning of RICO, and thus it does not meet the second prong of the "enterprise" definition. This Court should reverse the judgment below on this ground and halt the continued trend in the lower courts that ignores the plain statutory text and improperly extends RICO association-in-fact enterprises to cases where a corporation is a constituent of a group. This clear-cut approach would establish a bright-line rule easily applied by lower courts and is most faithful to congressional intent.

Second, even if a corporation could serve as a constituent of an association-in-fact enterprise, plaintiffs did not adequately allege here that the defendant corporation conducted or participated in the conduct of the affairs of an enterprise distinct from the affairs of the corporation itself. This Court should adopt the position taken by a vast majority of the courts of appeals that a defendant corporation and agents acting on its behalf do not constitute an enterprise distinct from the corporation itself. The contrary approach by the court below unfairly penalizes corporations for contracting with others to handle the corporation's affairs and establishes a false distinction between such corporations and those who hire employees to perform the same functions.

ARGUMENT

A CORPORATE DEFENDANT CANNOT BE LIABLE FOR CONDUCTING THE AFFAIRS OF A RICO ASSOCIATION-IN-FACT ENTERPRISE WHEN THE ALLEGEDLY DISTINCT ENTERPRISE CONSISTS OF THE CORPORATION AND THOSE IT ENLISTS TO ASSIST IT IN CONDUCTING THE CORPORATION'S AFFAIRS

A. The Association-in-Fact Prong Of The "Enterprise" Definition In RICO Section 1961(4) Applies Only To Groups Of "Individuals," Which Requires Reversal Of The Judgment Below

This case is but one in a continuing series of lower court decisions that have ignored the limits of the plain text of RICO Section 1961(4)'s definition of an association-in-fact "enterprise." The lower courts have, instead, seized upon a portion of one statement of this Court in *United States v. Turkette*, 452 U.S. 576 (1981), and have taken it out of context to declare summarily that "[t]here is no restriction upon the associations embraced by the definition." *United States v. Perholtz*, 842 F.2d 343, 353 (D.C. Cir.) (quoting *Turkette*, 452 U.S. at 580), *cert. denied*, 488 U.S. 821 (1988). Those courts ignore the critical next phrase in the Court's opinion, rooted in the statutory text, that "an enterprise includes any union or group of individuals associated in fact." *Turkette*, 452 U.S. at 580; *see, e.g., United States v. Feldman*, 853 F.2d 648, 655 (9th Cir. 1988). This Court should take this opportunity to curb the lower courts' expansion of the RICO "enterprise" definition and to give effect to Congress's intent that the definition hold the statute within bounds. *See* 18 U.S.C. 1961(4); Arthur F. Mathews *et al.*, *Report of the Ad Hoc Civil RICO Task Force*, American Bar Ass'n Section of Corp. Banking & Bus. L., at 104 (1985) (ABA Report).

1. An association-in-fact enterprise is limited to a group of "individuals," and a corporation is not an individual within the meaning of the statute

The starting place in construing the statute is, of course, the language of the statute itself. *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993).

Congress expressly stated that, as used in RICO, "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). This Court has explained that this definition includes "two categories of associations." *Turkette*, 452 U.S. at 581. Those in the first category are associations under law, *i.e.* "legal entit[ies]." Under this first prong of the definition, a corporation, as a legal entity, can constitute a RICO "enterprise" where it is alleged that the corporation's affairs are being conducted by the defendant through a pattern of racketeering. In such instances, the defendant is a person who is either victimizing the corporation or using the corporation as a tool to engage in racketeering. This case does not involve any allegation that the Mohawk corporation or any other corporation constitutes such a legal-entity enterprise.

The instant case involves the second category of associations, those that are a "union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). By its express terms, that association-in-fact category of enterprise does not include groups of corporations. Congress used the term "individuals" in the context of the RICO statute in the ordinary sense of the word to mean "an individual human being" and not a corporation or other entity. *See Clinton v. New York*, 524 U.S. 417, 428 n.13 (1998) (citing Webster's Third New International Dictionary 1152 (1986)). By adopting this interpretation, however, one need not go so far as to conclude that "corporations . . . are not 'individuals' under

any accepted usage of that term." *Id.* at 454 (Scalia, J. concurring in part and dissenting in part).[2] The context and structure of the RICO statute confirm that Congress intended this interpretation of the term for purposes of RICO.

First, the structure of Section 1961(4) reveals that in the single sentence defining a RICO "enterprise" Congress used the word "individual" twice. The first use of the term "individual" is in the legal-entity prong of the definition, which states that "enterprise" includes "any *individual*, partnership, corporation, association, or other legal entity." 18 U.S.C. § 1961(4) (emphasis added). That use of "individual" must be read to mean a single human being because otherwise it would be surplusage, and result in a construction that should be avoided. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Congress expressly included "corporation" in the legal-entity prong of the definition as well as the catch-all phrase "or other legal entity." Congress would have had no reason to also add the term "individual" to mean a generic concept broad enough to cover corporations. The only reason for adding the term "individual" would have been to mean it to refer to a single human being which would not otherwise have been covered by the list. This same meaning of "individual" as a single human being should be given to the second use of the term in that same sentence because when Congress

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[2] In *Clinton v. New York*, this Court construed "individual" synonymously with the broader term "person," but only because, in the specific context of the line-item veto statute at issue there, to do otherwise "'would produce an absurd and unjust result which Congress could not have intended.'" 524 U.S. at 428-429 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982)). Lower courts have given different answers to the question whether "individual" refers only to human beings in different contexts. *See, e.g., In re Oliver North (Gadd Fee Application)*, 12 F.3d 252, 254-255 (D.C. Cir. 1994) ("individual" as used in the Ethics in Government Act's fee provision means human being); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1175-1176 (C.D. Cal. 2005) ("individual" as used in the Torture Victim Protection Act means human being, but citing cases deciding the issue differently).

uses the same term more than once in the same provision, "it seems reasonable to give each use a similar construction." *Reves*, 507 U.S. at 177. Thus, "individual" means a single human being in the phrase "group of individuals associated in fact" in the second prong of the "enterprise" definition.

Second, the overall statutory framework reveals that Congress used the term "individual" in another statutory definition in RICO to mean a single human being. Congress provided that, as used in RICO, "'person' includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). If that use of "individual" were broad enough to include a corporation then the term "or entity" would be surplusage because Congress could have accomplished the same result by defining a person simply to include "any individual capable of holding a legal or beneficial interest in property" and it would have covered corporations.

Third, the definitional provisions of Title 18, where RICO is codified, use the term "individual" to exclude organizations. Section 18 provides that, "[a]s used in this title, the term 'organization' means a person other than an individual." 18 U.S.C. § 18. By defining an "organization" as something "other than an individual," Congress made clear that "organization" does not mean an "individual" and "individual" does not mean "organization." The terms are intended to be mutually exclusive. Because a corporation is clearly an organization, it is a "person" under Title 18 but not an "individual."[3]

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[3] Although not part of the RICO statute itself, other provisions of Title 18 corroborate that "individual" generally excludes "organization," and vice versa. For example, the maximum fine for one who "organizes, manages, or supervises a continuing financial crimes enterprise" is $10 million "if an individual," and twice that "if an organization." 18 U.S.C. § 225. And certain provisions of the Sentencing Guidelines apply "only if the defendant is an individual," U.S. Sentencing Guidelines §§ 5E1.3, 8E1.1, while others apply only in the "Sentencing of Organizations," *id.* at § 8A1.2.

In sum, Congress defined the term "enterprise" in RICO to mean a legal entity (including a corporation) standing alone, as well as a less formal association that does not constitute a legal entity, but only if such an association is a union or group of "individuals." A group comprised of a corporation plus others is not a RICO "enterprise" because a corporation is not an "individual."

2. This Court should use the occasion of this case to halt the lower courts' misguided expansion of the RICO "enterprise" definition

Lower courts have given short shrift to Congress's definition of "enterprise," but for reasons that need not long detain this Court.

a. Some lower courts have cited Congress's use of the term "includes" at the beginning of the "enterprise" definition ("'enterprise' includes * * * ") and held that the list of entities that follows "is not meant to be exhaustive," so that an informal group including corporations can constitute an association-in-fact enterprise. *See, e.g., Perholtz*, 842 F.2d at 352-353.[4] But those courts fail to appreciate the varied linguistic roles of the term "includes."

The term "includes" "may be used as a word of enlargement," but that is its "exceptional sense, as the dictionaries and cases indicate." *Montello Salt Co. v. Utah*, 221 U.S. 452, 466 (1911). Its "ordinary" use is to "specify particularly" those items which fall within a classification.

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[4] *See also United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989); *but see United States v. McClendon*, 712 F. Supp. 723, 730 (E.D. Ark. 1988) (noting that "Congress could have simply inserted the words 'corporations or other legal entities' after the word 'individuals' in the second prong" of the definition, but recognizing that the court could not do so); *Benard v. Hoff*, 727 F. Supp. 211, 215 (D. Md. 1989) ("[c]orporations cannot under RICO associate in fact to constitute an enterprise").

Ibid. Courts cannot rely on the broader meaning of "include[s]" to "render[] nugatory" the "careful process of exclusion and inclusion pursued by Congress." *Corporation Comm'n of Oklahoma v. Federal Power Comm'n*, 415 U.S. 961, 968 (1974) (Rehnquist, J., dissenting from summary affirmance).

Congress used the term "includes" in its Section 1961(4) definition of "enterprise" "as a term of limitation, indicating what belongs to a genus." *Blankenship v. Western Union Tel. Co.*, 161 F.2d 168, 169 (4th Cir. 1947) (*citing Montello Salt Co.*, 221 U.S. at 466). Otherwise, there is no limit to what might constitute a RICO "enterprise." There would also be little practical relevance to this Court's recognition of "an enterprise" as one of four elements of Section 1962(c) that limits the reach of RICO. *See Sedima v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985).

Congress used "includes" similarly in other RICO definitions to be exhaustive. For example, the RICO definition of "Attorney General" states: "'Attorney General' *includes* the Attorney General of [the] United States * * * or any employee of the department [of Justice] or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter." 18 U.S.C. § 1961(10) (emphasis added). By contrast, where Congress intended to be illustrative rather than exhaustive, it used the phrase "including, but not limited to * * * " in the RICO statute. *See, e.g.*, 18 U.S.C. § 1964(a) (authorizing equitable remedies "including, but not limited to" dissolving the enterprise). Thus, there is no reason to believe Congress intended its definition of "enterprise" to be open-ended.

b. A second reason that some courts have given for construing the association-in-fact prong of the RICO "enterprise" definition to include groups of corporations is that to do otherwise would, according to those courts, mean "that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO." *United States v. London*, 66 F.3d 1227, 1244 (1st

Cir. 1995) (quoting *Perholtz*, 842 F.2d at 343), *cert. denied*, 517 U.S. 1155 (1996); *United States v. Masters*, 924 F.2d 1362, 1366-1367 (7th Cir. 1991), *cert. denied*, 508 U.S. 906 (1993).

But that is by no means true. The prohibitions of RICO make it unlawful for any "person" to engage in the prohibited conduct. Thus, an individual criminal can be charged as a RICO defendant under 18 U.S.C. § 1962(c) even if he formed a corporate shell. Further, as discussed above, "person" is defined in RICO to include any "entity capable of holding a legal or beneficial interest in property" which, of course, includes corporations. 18 U.S.C. § 1961(3). Thus, a corporation also clearly can be charged as a RICO defendant, even though it cannot be deemed part of an association-in-fact RICO enterprise. For example, if a corporation participates in the conduct of the affairs of its state regulatory agency, which is a legal-entity enterprise under RICO, by bribing the officials of the enterprise and thus operating or managing that enterprise, the corporation would be liable under Section 1962(c). *Cf. H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 233-234 (1989).

Indeed, a corporation, as a legal entity, can constitute a RICO enterprise standing alone and those persons, corporate or otherwise (other than the enterprise itself), who conduct its affairs through racketeering are liable as RICO defendants under Section 1962(c). Just because the language of the statute prevents plaintiffs from consolidating into a single artificially-constructed "enterprise" all corrupted legal entities does not mean that it exempts from RICO liability any person who corrupts more than one legal entity. Thus, if groups of corporations or other legal entities are corrupted, any person conducting the affairs of those entities through racketeering would be liable for multiple violations of Section 1962(c) because each corrupted corporation or other legal entity would constitute a separate RICO enterprise and would support a separate RICO charge.

Finally, in complex schemes, a person, corporate or otherwise, may be liable under Section 1962(d) for conspiracy to violate one or more of the other RICO prohibitions, 18 U.S.C. § 1962(a)-(c).[5] In appropriate circumstances, a corporation may also be liable as a defendant under any statute that would otherwise have been charged as a predicate offense.

c. Some lower courts also have construed "enterprise" in an overly broad manner by invoking the RICO clause that provides that RICO "'shall be liberally construed to effectuate its remedial purposes.'" *See, e.g., Huber*, 603 F.2d at 394 (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970)). This clause, however, "is not an invitation to apply RICO to new purposes that Congress never intended." *Reves*, 507 U.S. at 183. It also butts up against the rule of lenity, which requires that RICO, like any criminal statute, be strictly construed with ambiguities resolved in favor of the accused. *See Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 408 (2003); *FCC v. American Broad. Co.*, 347 U.S. 284, 296 (1954) (statutes that permit both civil and criminal remedies "are to be construed strictly"). Moreover, although in appropriate circumstances either statutory canon may "serve[] as an aid for resolving ambiguity," they are "not to be used to beget one." *Turkette*, 452 U.S. at 587 n.10 (quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961)). Here, there is no ambiguity when the language of the statute is considered in its entirety because it is clear that only a group of "individuals," and not a group

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[5] Section 1962(c) addresses only one of the four activities prohibited by RICO. Those other prohibitions also reach conduct by persons such as corporations. The other three prohibitions are against: persons using income derived from racketeering to acquire interest in an enterprise affecting interstate commerce (18 U.S.C. § 1962(a)); persons acquiring or maintaining an interest or control, through a pattern of racketeering, of an enterprise affecting interstate commerce (18 U.S.C. § 1962(b)); and persons conspiring to violate the other three prohibitions of the section (18 U.S.C. § 1962(d)).

consisting of corporations and others, constitutes an association-in-fact enterprise under RICO.

d. Interestingly, the failure of some lower courts to abide by the plain language of the RICO definition of an association-in-fact enterprise is what created for them the other problem presented by this case – a defendant being charged with conducting the affairs of an enterprise that is not distinct from the defendant itself. To take a single example, in *United States v. Masters*, 924 F.2d 1362 (7th Cir. 1991), the court faced a situation where an individual defendant was alleged to have corrupted several legal entities (a law firm and two police departments), but the entities were treated by the court collectively as one "enterprise" under RICO. Several years later, in a different case, the court refused to revisit its unduly broad interpretation of the statutory definition of "enterprise," but nonetheless held that an employer and its employees could not constitute a RICO enterprise simply because it was a too "far-fetched possibility," even though that court's precedent would have supported a contrary outcome. *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 266 (7th Cir. 1997).

A straightforward reading of the statutory text would more easily have resolved both of that court's cases. A correct reading of the association-in-fact enterprise definition would have allowed a bright-line dismissal of the second case (and cases like the instant one) where a corporation is both charged as the RICO "person" alleged to have violated Section 1962(c) and identified as a part of the association-in-fact enterprise with those who carry out the corporation's business affairs. In the first case, it would merely have meant that the defendant would have to be charged with corrupting three legal-entity enterprises rather than one conglomerate enterprise.

3. This Court should resolve this case based on the plain meaning interpretation of association-in-fact enterprise to prevent circumvention of this Court's decision in *Reves*

The merits of the plain meaning interpretation of the association-in-fact "enterprise" definition perhaps come into sharpest focus if one considers the alternative. If this Court were to construe a RICO association-in-fact enterprise to encompass a corporation in a group with other legal entities or individuals, it would create an opening for circumvention by plaintiffs of the holding in *Reves v. Ernst & Young*, 507 U.S. 170 (1993), that a person conducts or participates in the conduct of a RICO enterprise in violation of Section 1962(c) only if the person participates in the operation or management of the enterprise.

In *Reves*, this Court refused to hold an accounting firm liable under Section 1962(c) for alleged fraud in the preparation of the financial statements of a cooperative. 507 U.S. at 186. The cooperative had been properly identified by plaintiffs as a RICO enterprise, and the Court reasoned that the accountants, as outsiders to the cooperative, had played no part in conducting or participating in the conduct of the enterprise's affairs. *Id.* at 179.

If, however, a single association-in-fact "enterprise" could be artificially constructed by cobbling together the accounting firm and the cooperative, the opposite result would obtain. The accountants would remain outsiders to the cooperative, but they would become insiders to this synthetic "enterprise." The accounting firm, by conducting its own affairs as part of the combined enterprise, necessarily would have played "some part in directing the enterprise's affairs," if the "enterprise" included itself as well as the cooperative. *Ibid.* This Court would have found the "operation and management" test satisfied, and would not have affirmed summary judgment in favor of the accounting firm.

In other words, those courts (like the court of appeals in this case) who read the association-in-fact "enterprise" definition to include any mish-mash of entities thereby read out of the statute not only the limits of the definition; they also nullify this Court's "operation and management" test. Almost any defendant can be said to operate or manage the affairs of an association-in-fact enterprise if the boundaries of the enterprise may be purposefully drawn to bring in the defendant. The RICO statute is broad, but it was never intended to be limitless through such a misconstruction of the statutory text.

In this case, because the alleged enterprise was a group of corporations and individuals, that group was not a RICO enterprise under Section 1962(c), and the decision of the court of appeals should therefore be reversed on that ground.

B. A Corporation Conducting Its Own Affairs With The Assistance Of Other Entities Or Individuals Is Not, By Virtue Of That Assistance Alone, Conducting The Affairs Of An Enterprise In Violation Of RICO Section 1962(c)

1. To violate Section 1962(c), a RICO defendant must conduct, through a pattern of racketeering, the affairs of an enterprise distinct from the affairs of the defendant itself

A corporation is liable as a person for violation of Section 1962(c) when, through a pattern of racketeering activity, it influences or corrupts a RICO enterprise with which it is associated. To establish liability under Section 1962(c), the plaintiffs "must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001). A corporation cannot be sued or prosecuted under Section 1962(c) for conducting its

own affairs, even if it is alleged to have done so through a pattern of racketeering activity.

This requirement for a RICO enterprise distinct from the defendant follows from the language of the statute. First, Section 1962(c) requires that the accused "person" be "employed by or associated with" the subverted "enterprise." 18 U.S.C. § 1962(c). The accused "person" cannot be identical to the "enterprise" because one does not speak of a person being "employed by or associated with" itself. *See Cedric Kushner Promotions*, 533 U.S. at 161. Second, reinforcing the requirement that the "enterprise" be distinct from the defendant person, Section 1962(c) reserves liability for persons who have "conducted or participated in the conduct of the *'enterprise's* affairs,' not just their *own* affairs." *Reves*, 507 U.S. at 185 (quoting 18 U.S.C. § 1962(c) (emphasis in original)).

Because a corporation is a legal construct, it can act only through others. A corporation often acts through the individuals that it hires as employees. A corporation also often acts, however, through non-employees that it retains for a specific purpose, such as independent contractors.[6] A corporation might engage recruiters to locate workers as in the instant case, and it also might engage a myriad of others to perform other specialized tasks. For example, corporations regularly hire underwriters to raise capital; dealers to sell the manufacturers' products; accountants to audit corporate accounting books; lawyers to draw up contracts; real estate brokers to assist in procuring property; security companies to protect corporate personnel and facilities; advertising agencies to build demand for products; manufacturers to create components for products; health maintenance organizations to provide benefits for employees; management consultants to assist

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[6] An employee generally is a fiduciary who acts on behalf of another and is subject to his control, whereas generally "[a]n independent contractor is a person who contracts with another to do something for him but who is not controlled by the other." *See Restatement (Second) of Agency* §§ 1-2 (1958).

in strategic planning; plumbers and electricians to build or maintain facilities; and innumerable other varieties of service providers. All of these entities assist a corporation in conducting its own business affairs.

The requirement for an enterprise distinct from the defendant thus has special resonance in this context. This Court recognized as much in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164 (2001), where it was dubious of an "oddly constructed entity" as a RICO "enterprise" that was alleged to consist of a corporation together with its employees and agents. The Court observed that it is awkward to speak of a corporate "person" being "employed by" or "associated with" an enterprise consisting of the corporation and its employees and agents. *Id.* at 164 (discussing *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994)).

Whether a corporation hires an individual as an employee, subcontracts with an individual or another corporation, or conducts certain of its affairs through a subsidiary, the analysis under RICO should be the same. Just as a corporation conducting its own affairs through its own employees does not violate the prohibition of Section 1962(c) according to well-reasoned and unanimous case law in the lower courts, a corporation conducting its own affairs with assistance from non-employees also does not violate Section 1962(c).[7] In either scenario, the

[7] Numerous lower courts have so held. *See, e.g., Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1062-1064 (2d Cir. 1996), *rev'd on other grounds*, 525 U.S. 128 (1998) (defendant holding company, together with its subsidiaries, attorneys, accountants, and other agents not a distinct RICO entity); *Brittingham v. Mobil Corp.*, 943 F.2d 297, 303-304 (3rd Cir. 1991) (manufacturer defendant and its advertising agency not a distinct RICO enterprise); *Entre Computer Ctrs., Inc. v. FMG of Kansas City, Inc.*, 819 F.2d 1279, 1287 (4th Cir. 1987) (defendant franchiser and franchisee not a distinct RICO enterprise); *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir. 1987) (defendant bank, its holding company, and three employees not a distinct RICO enterprise); *Fitzgerald*, 116 F.3d at 228 (defendant automobile corporation, with its subsidiaries, dealers, and trusts not a

(Continued on following page)

activities of the corporation are the same; it is conducting its "*own* affairs." *Reves*, 507 U.S. at 185. Thus, when a corporation conducts its affairs the only way it can, *i.e.*, through others, it does not "conduct or participate * * * in the conduct of" the affairs of a distinct RICO enterprise. 18 U.S.C. § 1962(c).

This rule does not immunize corporations from liability under Section 1962(c) for the reasons already discussed. *See* pages 10-12, *supra*. A corporation is liable as a RICO defendant if it conducts (or participates in conducting), through a pattern of racketeering, the affairs of an enterprise with which it associates, but which is distinct from the corporation itself.

In this case, the allegations against the Mohawk corporation are that it contracted with outside agencies to recruit people to hire, albeit in violation of the immigration laws. *See, e.g.*, J.A. 23-24. Because Mohawk was having the outside agencies conduct its own business affairs, the allegations do not establish that the corporation was conducting a distinct RICO enterprise and therefore do not allege a violation of Section 1962(c), so the decision of the court of appeals must be reversed.

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distinct RICO enterprise); *Brannon v. Boatmen's First Nat'l Bank of Oklahoma*, 153 F.3d 1144, 1147 (10th Cir. 1998) (defendants bank holding company and subsidiary lender not distinct RICO enterprises); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d 132, 141 (D.C. Cir. 1989) (en banc) (defendant union and its business agent not a distinct RICO enterprise), *cert. denied*, 501 U.S. 1222 (1992).

2. The contrary ruling of the court of appeals improperly threatens a corporation with treble damages based on use of contractors to conduct the corporation's business affairs, which is a common business practice that is critical to the efficiency of the Nation's economy

a. Corporations contracting with those outside the corporation to provide goods and services to conduct the affairs of the corporation is a well-established and growing trend nationwide. As of 2005, 10.3 million individuals work as independent contractors in this country, totaling 7.4% of the total civilian American workforce, and contingent workers (*i.e.*, workers who do not have a contract or expectation for ongoing employment) account for another 1.8% to 4.1% of the workforce. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Contingent and Alternative Employment Arrangements, February 2005* (July 27, 2005), at 1, *available at* http://www.bls.gov/news.release/pdf/conemp.pdf. Typically, small corporations (less than 500 employees) use independent contractors and contingent workers in goods-producing industries, while larger corporations use contingent workers in the service industry. *See* Joel Popkin & Co., *Labor Shortages, Needs and Related Issues in Small and Large Businesses, Part B: Contingent Workers in Small and Large Firms (Final Report): Presented to the Office of Advocacy, U.S. Small Business Administration* (1999), at 10, *available at* http://www.sba.gov/advo/research/rs195btot.pdf.

Moreover, entire sectors of the Nation's service economy, such as law and accounting firms, investment banks, private security companies, computer consultants, and employment recruitment agencies, are designed to assist corporate clients to conduct their affairs though the use of non-employees.

The increase in the use of independent contracting is due to the benefits gained by both corporations and individual workers. Many corporations find that relying on outside firms to provide discrete goods or services frees the

company to focus on its core competencies. *See Partners in Wealth: The Ins & Outs Of Collaboration*, The Economist, January 21, 2006 (Survey: The Company: The New Organisation), at 16; Andrew Leonard, *This Nerd for Hire*, Salon, April 17, 1997, *at* http://archive.salon.com/p/articles/mi_m4021/is_n2_v18/ai_17966617 ("Silicon Valley corporations rely on independent contractors and other forms of "temporary" labor more heavily than companies in any other U.S. region. In the home of the virtual corporation, everything, ideally, is contracted out – marketing, manufacturing, distribution – and everyone is an independent contractor. Flexibility is king."). In particular, corporations increasingly retain others to perform vital human resource functions. *See Partners in Wealth*, *supra*, at 16-17. Such focus is necessary to compete in the global marketplace.

In addition, independent contractors are likely to increase innovation and can be a source of knowledge creation for corporations. *See* Timothy J. Vogus & Theresa M. Welbourne, *Structuring for High Reliability: HR Practices and Mindful Processes in Reliability-Seeking Organizations*, 24 J. Organiz. Behav. 877, 882, 897 (2003), *available at* http://www.eepulse.com/documents/pdfs/HR practices.pdf; Sharon F. Matusik & Charles W. Hill, *The Utilization of Contingent Work, Knowledge Creation, Competitive Advantage*, 23 Acad. of Mgmt. Rev. 680, 683, 685-688 (1998).

Use of independent contractors also benefits a corporation because it enhances its ability to rapidly adjust workforce size as demand for a corporation's products or services shifts. *See* Courtney von Hippel *et al.*, *Temporary Employment: Can Organizations and Employees Both Win?* 11 Acad. of Mgmt. Exec. 93, 94-95 (1997).

The availability of independent contractors directly benefits individuals as well. It allows individuals who are employees of a corporation to focus on the corporation's core mission, and leaves non-core administrative and operational functions, such as maintaining the payroll or

cleaning the office, to specialized independent contractors. *See* Jan Larson, *Temps Are Here to Stay*, 18 American Demographics 26, 28 (Feb. 1996), *available at* www.findarticles.com/p/articles/mi_m4021/is_n2_v18/ai_17966617.

At the same time, it allows individuals who prefer flexibility to work as, or for, independent contractors themselves. *See, e.g.*, Larson, *supra*, at 30-31; Janet H. Marler *et al.*, *Boundaryless Organizations and Boundaryless Careers: A New Market for High Skilled Temporary Work* (Cornell Univ. CAHRS Working Paper Series, Working Paper 98-01), at 12, 22-23 (1998), *available at* http://instruct1.cit.cornell.edu/courses/ilrhr769/98-01.pdf (individuals who did not want to be permanent employees "enjoyed work flexibility because they could choose when to work").[8] There is some evidence that "married women in the workplace who desire more flexible schedules and individuals who retire and reenter the workforce as independent contractors explain the increases in the supply of individuals" working as contingent workers. Janet H. Marler, *Alternative Work Arrangements*, in *Work-Family Encyclopedia* (Patricia Raskin & Marcie Pitt-Catsouphes eds., 2004), at http://wfnetwork.bc.edu/encyclopedia_entry.php?id=219. Independent contractors generally are more educated than the remainder of the workforce. *See* Popkin, *supra*, at i.

b. The threat of treble damages under RICO should not be allowed to undermine corporate decisions to contract out certain business functions rather than hire employees to perform them in-house. That decision is properly guided by a corporation's fiduciary duty to its

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[8] *See also* Robin F. DeMattia, *Change Is Part of Temporary Worker's Job*, N.Y. Times, April 19, 1998, § 14WC, at 41 ("'There's a great interest by people who want to be independent contractors and control their own job growth and destiny,' Ms. Gray said. 'I think part of it is Generation X, where people don't want to get tied down to one company or such a routine.'"); Andrew Leonard, *This Nerd for Hire*, *supra* ("independent contractors are more content with the flux of their work lives – they luxuriate in the freedom to spend more time with their children or to work at home").

owners and "[d]ramatically expanding RICO liability because of a business organization choice makes little sense from a policy perspective." *Brannon*, 153 F.3d at 1147.

RICO's civil action is an "unusually potent weapon – the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). Designed to deter and extirpate organized crime, its expanding scope through lower court interpretations provides an improper tool to induce settlements from legitimate businesses that cannot risk the possibility of being subjected to an award of treble damages and attorneys' fees. *See* 18 U.S.C. § 1964(c). "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." *Sedima*, 473 U.S. at 506 (Marshall, J. dissenting) (citing ABA Report, *supra*, at 69).

In addition to the financial penalties, businesses experience "an almost inevitable stigmatizing effect" when sued in federal court under a statute associated with racketeers and mobsters. *Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990); *see also* H.R. Rep. No. 91-1549, at 187 (dissenting views of Reps. Mikva, Conyers, and Ryan) ("What a protracted, expensive [civil RICO] trial may not succeed in doing, the adverse publicity may well accomplish – destruction of [a defendant's] business.").

This Court has long recognized the potential for abuse of the civil RICO statute. More than two decades ago, it expressed "concern over the consequences of an unbridled reading of the statute," observing that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors." *Sedima*, 473 U.S. at 481, 500 (citing ABA Report, *supra*, at 55-69); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, J., concurring) (reach of "the federal mail and wire fraud laws is vast" but "exists against a backdrop of prosecutorial discretion," whereas

"[n]o such check operates in the civil realm"); *Scheidler*, 537 U.S. at 412 (Ginsburg, J. concurring) (reiterating concerns of *Sedima*, 473 U.S. at 481, 500).

To prevent such abuse of civil RICO, the statute must be read consistent with its text and origins so that its potent remedies can be wielded only against the evils that motivated Congress to enact the legislation. It is undisputed that "RICO's major purpose was to attack the 'infiltration of organized crime and racketeering into legitimate organizations.'" *Reves*, 507 U.S. at 185 (quoting S. Rep. No. 91-617, at 76 (1969)).

The court of appeals' ruling, however, is not limited to preventing a person or entity from victimizing a business, or subverting a corporation to further its distinct criminal purposes. *See Cedric Kushner Promotions*, 533 U.S. at 165-166. The court's holding creates incentives for corporations to internalize more functions and hire more employees, leading to possibly less efficient and competitive operations and harming the interests of individuals as workers, shareholders, and consumers. Those incentives have no relationship to preventing the type of abuse for which RICO was designed. As Judge Posner noted: "What possible difference * * * can it make that Chrysler sells its products to the consumer through franchised dealers rather than through dealerships that it owns, or finances the purchases of its motor vehicles through trusts, or sells abroad through subsidiaries? We have never heard it suggested that RICO was intended to encourage vertical integration, yet that is the only effect that we can imagine flowing from" a rule allowing RICO claims against "Chrysler merely because Chrysler does business through agents, as virtually every manufacturer does." *Fitzgerald*, 116 F.3d at 227.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below with regard to the federal RICO claims.

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